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No. 93-559

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

COLORADO STATE BOARD OF AGRICULTURE, in its capacity as the governing board of the Colorado State University,

Petitioner,

v.

JENNIFER ROBERTS, JULIE OSBORNE, JANET BRUMBELOW, LAURA BIELAK, SARA STOUT, AMY RECOUPER, JENNIFER JACOBS, MALIA KUENZLI, STACIE STAFFORD, HEATHER NAKASONE, KIM JOHNSON, AIMEE RICE AINSWORTH, and LISA MIZE, in their individual capacities,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a violation of Title IX's regulations as interpreted by the enforcing agency states a violation of the Act.

2. Whether the court of appeals properly held that the district court did not abuse its discretion in providing a remedy for the specific violation of law that it found.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In a carefully reasoned decision fully consistent with all applicable law, the Tenth Circuit panel[1] unanimously affirmed the district court's[2] fact-specific holding that respondents' individual rights guaranteed under Title IX of the Education Amendments of 1972[3] had been violated

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[1] McKay, C. J., Anderson, J., and opinion by Logan, J.

[2] Weinshienk, J. (D. Colo.).

[3] 20 U.S.C. §§ 1681-87 (1988). Petitioner properly concedes that it is subject to the requirements of Title IX. Pet. 3.

and that respondents were entitled to the reinstatement of their softball team. Only the narrow and factually-driven questions of whether respondents were discriminatorily denied the opportunity to participate in varsity athletics at Colorado State University (CSU), and, if so, whether they were entitled to the reinstatement of their team, are presented. This case does not involve the myriad of other questions that petitioner asks this Court to consider, such as whether a university is required to maintain statistical parity in its men's and women's athletic programs, or whether a university that has a gender imbalance in its athletics programs may ever eliminate a women's team. Moreover, notwithstanding petitioner's invocation of numerous extra-record facts and broadly drawn and inapposite policy arguments, this petition is a wholly inappropriate vehicle and seeks a wholly inappropriate forum for the referendum on the politically-charged issue of gender equity in intercollegiate athletics which petitioner apparently proposes.

In June of 1992, CSU and the Colorado State Board of Agriculture (SBA) terminated the women's varsity intercollegiate softball program and the men's baseball team.[4] Respondents, female students at CSU who were members of the softball team, filed suit in their individual capacities on June 29, 1992, in United States District Court for the District of Colorado, seeking reinstatement of the women's varsity softball program. Respondents asserted claims under Title IX and its implementing regulations to challenge the intentionally discriminatory denial of their right to an equal opportunity to participate in varsity intercollegiate athletics.[5]

[4] For the reasons discussed below, the termination of baseball did not constitute a defense to the finding of discrimination. *See infra* at 4-5.

[5] Petitioner is incorrect in asserting that "[r]espondents did not allege intentional discrimination." Pet. 6. *See* Second Am. Compl. at 2 (alleging that CSU "has engaged in a past and con-

After hearing all of the evidence at trial, the district court found CSU's athletic program in violation of Title IX and the athletics regulation, 34 C.F.R. § 106.41, and ordered CSU and SBA to reinstate the varsity women's softball program. Pet. App. A-20 - A-21. The district court first carefully analyzed the regulatory framework of Title IX, beginning with the athletics regulation promulgated by the Department of Education. According proper deference to the enforcing agency's interpretation of its own regulation, *see infra* at 13 n.16, 18, the district court held that the controlling standard is "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes," 34 C.F.R. § 106.41(c), and that discrimination in this area alone constitutes a violation of Title IX. Pet. App. A-4 - A-5.

The district court then adopted the three-part test for compliance with the athletics regulation set forth in the enforcing agency's official interpretation of the regulation:

> 1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> 2) Where the members of one sex have been and are under-represented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
>
> 3) Where the members of one sex are under-represented among intercollegiate athletes, and the insti-

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tinuing pattern and practice of knowingly and intentionally discriminating against plaintiffs on the basis of sex . . . ."). Indeed, the petition is replete with incorrect statements of the record and mischaracterizations of the decisions below. Respondents will only address those misstatements and mischaracterizations which are relevant to the issues before the Court.

> tution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of that sex have been fully and effectively accommodated by the present program.

Pet. App. A-5 (quoting *Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71413, 71418 (1979) (hereinafter, Policy Interpretation)).

Based on the record evidence, the district court found that CSU did not meet any of the requirements of the three-prong test. The district court first found that the plaintiffs had met their burden of proving that CSU did not provide intercollegiate athletic opportunities for female students in numbers substantially proportionate to their enrollment.[6] During the 1992-1993 school year, women athletes were 37.7% of total CSU varsity athletes, while female enrollment was 48.2% of the undergraduate student population, resulting in a disparity of 10.5%. Pet. App. A-7.[7] Relying on the governing law and the statistical evidence presented at trial, the district court concluded that female athletic participation at CSU was not substantially proportionate to female enrollment either before or after the termination of softball in 1992. *Id.* at A-9.

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[6] The relevant inquiry under this test is the number of participation opportunities provided by CSU, and not, as petitioner suggests, the number of teams sponsored. Pet. 4-5. Because of obvious differences among sports, the number of teams sponsored for each sex is not indicative of relative participation opportunities. *Cf.* Policy Interpretation, 44 Fed. Reg. at 71422 (explaining that the agency's rejection of team-based comparisons was based on the unfairness of comparing large participation sports, such as football, to smaller ones, such as women's volleyball).

[7] Indeed, women's share of intercolleg.ate athletic participation had actually declined since 1980. Pet. App. A-6. By limiting its review of CSU's historical participation data to 1988-1989, Pet. 5 n.5, 6, petitioner presents a selective and self-serving view of the record.

The district court then found that CSU had failed to show a history and continuing practice of program expansion responsive to women. Giving the language in the Policy Interpretation its plain meaning, the district court rejected CSU's argument that the creation of a women's athletic program during the 1970s demonstrated the requisite program expansion because such an interpretation would "render meaningless Title IX's regulations and its Policy Interpretation," and "implicitly condone the attitude that female athletes at CSU should be satisfied with their current opportunities given the pre-1970 lack of participation opportunities for women in intercollegiate athletics." Pet. App. A-11. Similarly, the marginal increase in women's share of participation effected through the 1992 reductions of both baseball and softball did not establish program expansion. Rather, as the court explained, "CSU must either demonstrate actual expansion in women's athletic programming or establish that it has considered and improved upon the under-represented status of women athletes when reductions in athletic programs became necessary in the past." *Id.* at A-12. By finding that CSU had actually eliminated more athletic opportunities for women than for men over the last twelve years, the district court concluded that CSU could not demonstrate program expansion. *Id.* at A-12 - A-13.

The district court then made the factual finding that CSU's existing athletic program did not fully and effectively accommodate the interests and abilities of its female students. Pet. App. A-19 - A-20. The district court based this ruling on the substantial interest and ability in softball on the part of the plaintiffs, the recent success of the women's varsity softball team and the growing popularity of women's softball in Colorado and nationwide. *Id.* at A-16 - A-19.

The district court rejected CSU's proffered defenses that the termination of the softball program was accept-

able because it was motivated by budgetary concerns,[8] and that CSU had not intended to violate the law. The district court held that financial constraints are not a defense to a Title IX claim. Pet. App. A-20. Further, the court recognized that a specific intent to discriminate or to violate the law is not necessary to violate Title IX. *Id.* Moreover, the district court categorically rejected, as a factual matter, CSU's contention, restated here, Pet. 4-5, that it could not have intended to violate the law because it relied in good faith on the Department of Education Office for Civil Rights' (OCR) approval of its athletics program in 1989. The district court reviewed both the history of CSU's treatment of female athletes during the preceding decade and a series of OCR investigations and decisions regarding such treatment, and resolved the disputed factual questions. Pet. App. A-10-A-14. It then concluded "that lower participation rates and decreasing participation opportunities for women are not indicators of a good faith effort on behalf of defendants to increase athletic opportunities for female student athletes at Colorado State University."[9] *Id.* at A-15.

The district court issued a permanent injunction requiring CSU and SBA to reinstate women's softball as a varsity sport.[10] Contrary to petitioner's assertions, the

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[8] Petitioner's repeated characterization of the decision to cut softball as motivated by budgetary concerns, Pet. 3-4, 9, has no basis in the record. There is no factual support for the proposition that CSU's budgetary constraints necessitated cutbacks in women's participation opportunities generally, or softball specifically. Rather, the evidence in the record revealed that CSU allocated the lion's share of its athletic budget (77%) to the men's athletic program. Tr. at 637 (testimony of Corey Johnson, athletic director at CSU).

[9] In light of this finding, petitioner's assertion that the district court "refused even to consider evidence of CSU's good faith," Pet. 9, is incorrect.

[10] In direct response to CSU's noncompliance with the permanent injunction reinstating the team, at a status conference on March 11, 1993, the court specifically ordered CSU to hire a coach, begin

court's order in no way requires petitioner to "permanently . . . reinstate the women's softball program." Pet. 9. Rather, the court based its remedy on the "underlying mandate . . . that CSU may not continue to operate an intercollegiate athletic program that provides a disproportionate amount of participation opportunities to male athletes where there is no evidence of continuing program expansion or effective accommodation of the interests and abilities of its female students." Pet. App. A-20 - A-21.

The Tenth Circuit Court of Appeals unanimously affirmed the district court's findings of fact and conclusions of law.[11] First, consistent with interpretations of every court which has considered the issue and the enforcing agency, the Tenth Circuit held that "an institution may violate Title IX simply by failing to accommodate effectively the interests and abilities of student athletes of both sexes." Pet. App. C-7 - C-8. Second, the Tenth Circuit held that the three-part test adopted by OCR is the governing standard for determining compliance with Title IX, noting its obligation to "defer substantially to an agency's interpretation of its own regulations," particularly where, "as here, they are effectively legislative, pursuant to a statutory delegation." *Id.* at C-8.

The Tenth Circuit affirmed the district court's factual finding that plaintiffs demonstrated a substantial disproportion between women's athletic opportunities and enrollment, and held that "[t]he fact that many or even most other educational institutions have a greater imbalance

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the recruiting process and schedule a fall exhibition season. *See* Pet. App. B-3 (". . . it has been many years since I've had a party attempt to . . . stonewall a court order the way that this has been done in this case").

[11] The court of appeals reversed only the very narrow portion of the district court's March 11, 1993, order which required CSU to schedule a fall softball exhibition season on the grounds that the court had exceeded its authority. Pet. App. C-22 - C-23.

than CSU does not require a different holding." Pet. App. C-12. It also affirmed the district court's finding that CSU had failed to establish a history and continuing practice of program expansion where women's athletic opportunities had declined steadily during the 1980s and more women's than men's opportunities had been eliminated, stating "[t]he facts as found by the district court (and largely undisputed by defendant) can logically support no other conclusion . . . ." *Id.* at C-13. In so ruling, the Tenth Circuit concluded that "the ordinary meaning of the word 'expansion' may not be twisted to find compliance under this prong when schools have increased the relative percentages of women participating in athletics by making cuts in both men's and women's sports programs." *Id.* Turning to the third prong of the test, the Tenth Circuit affirmed the district court's finding that CSU's existing program did not fully and effectively accommodate the interests and abilities of female athletes based on the "extensive findings" of the district court with respect to the interests and abilities of CSU softball players and the feasibility of fielding a successful team.[12] *Id.* at C-15.

The Tenth Circuit, like the district court, rejected the argument that intent is necessary to establish a violation of the Title IX athletics regulation, relying on *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983). The Tenth Circuit found further support for this ruling in Title VII of the Civil Rights Act of 1964, noting that a showing of intent is not necessary to prove a violation of Title VII. Pet. App. C-17 - C-18.

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[12] Although the Tenth Circuit held that the district court had erred in placing the burden of proof on defendant with respect to this part of the test, it upheld the district court's finding of unaccommodated interest and ability based on the "more than adequate" evidence in the record. Pet. App. C-15. Contrary to petitioner's assertions, the court in no way held that terminating a women's team "automatically" establishes unaccommodated interests and abilities. Pet. 12.

Finally, the Tenth Circuit upheld the reinstatement of varsity women's softball as an appropriate remedy for the violation proven and within the discretion of the district court. The Tenth Circuit carefully distinguished between class actions and lawsuits brought by individual plaintiffs for the purposes of selecting an appropriate remedy, and concluded that the district court properly provided plaintiffs with individual relief tailored to the harm they sustained. Pet. App. C-19 - C-22. The Tenth Circuit also explained that the district court's order does not require CSU to permanently sustain a varsity softball team, as the relief runs to plaintiffs individually and is predicated on CSU's underlying violation of Title IX. *Id.* at C-21 - C-22.

Petitioner mischaracterizes the decision below in several key respects. First, petitioner inaccurately describes the Tenth Circuit as ruling that "a statistical imbalance *can* violate Title IX." Pet. 11 (emphasis in original). To the contrary, the Tenth Circuit carefully explained and held that a statistical imbalance between women's athletic participation and enrollment alone does not violate Title IX.[13] Pet. App. C-9 - C-11, C-14. Rather, substantial proportionality between women's athletic participation and enrollment is only a "safe harbor" which relieves institutions from any obligation to show continuing program expansion or to fully and effectively accommodate the

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[13] As the court of appeals clearly explained, a violation occurs only where such a disparity exists *and* the institution cannot show a continuing history of program expansion for women, *and* the plaintiffs demonstrate that women's athletic interests and abilities are not fully and effectively accommodated by the existing program. Pet. App. C-9, C-11 n.6, C-14. Moreover, even where all of these conditions exist, an institution may nevertheless decline to create or upgrade a team if there is not a reasonable expectation of competition for that team within the institution's normal competitive region. *Id.* at C-14.

interests and abilities of members of the underrepresented sex. *Id.* at C-9.

Second, there is no basis for petitioner's assertion that "the current rule in the Tenth Circuit" is that "no school which has not achieved strict proportionality may never [sic] discontinue a women's program for any reason." Pet. 12. Nothing in the court's ruling prevents a university which does not provide substantially proportionate athletic opportunities from terminating a women's team where sufficient interest and ability do not exist to sustain the team, where there are not sufficient competitive opportunities in the institution's normal competitive region, or where, as a result of other changes in the program, which could include cut-backs in the women's program, women's athletic participation becomes substantially proportionate to enrollment. Pet. App. C-13 - C-14.

Third, petitioner's characterization of the Tenth Circuit's holding with respect to the three-part test as establishing "an irrebuttable presumption" of a Title IX violation, Pet. 11, misrepresents both the test and the Tenth Circuit's decision. To the extent that petitioner refers to the first prong of the test as creating an *"irrebuttable* presumption" of discrimination based upon a statistical imbalance, Pet. 20 n.24, petitioner is plainly mistaken for the reasons explained above. *See supra* at 9 n.13. To the extent that petitioner describes the three-part test in its entirety as establishing an "irrebuttable presumption" of discrimination, Pet. 11, such a description is inapposite. A test which itself incorporates three independent, complete defenses to liability can hardly be described as an irrebutable presumption.

REASONS FOR DENYING THE WRIT

This case conflicts neither with the law in the circuits nor with any decisions of this Court, contrary to petitioner's assertions. Rather, the Tenth Circuit's decision is in full accord with this Court's admonition that "[t]here is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.'" *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (citations omitted). Further, this case does not present the question of whether the gender composition of a university's athletic program must mirror that of its student body. The finding of liability was not predicated upon such an assumption and the relief ordered did not mandate such a result. Finally, petitioner's suggestion that nothing less than the future of college athletics is at issue in this case materially overstates the significance of the Tenth Circuit's decision to reinstate a single softball team for individual respondents. Further review of this case is not warranted.

I. THE DECISION OF THE TENTH CIRCUIT IS IN ACCORD WITH ALL OTHER RELEVANT DECISIONS

The body of law which has developed regarding Title IX's prohibition of sex discrimination in intercollegiate athletics is consistent and in accord with the Tenth Circuit's decision in this case. *See Cohen v. Brown Univ.*, 809 F. Supp. 978 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993); *Favia v. Indiana Univ. of Penn.*, 812 F. Supp. 578 (W.D. Pa.), *mot. to modify order denied*, No. 93-3051, 1993 WL 405209 (3rd Cir. Oct. 13, 1993); *Cook v. Colgate Univ.*, 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated as moot*, 992 F.2d 17 (2d Cir. 1993).[14]

[14] The Magistrate Judge's analysis in *Cook* diverges in certain respects from that in other decisions, in particular by incorporating a sport-specific comparison of individual men's and women's teams and by adopting a Title VII-based burden of proof standard

Nonetheless, petitioner contends that the decision of the Tenth Circuit conflicts with other law in two regards. First, petitioner argues that there is a conflict regarding the question of whether Title IX prohibits only intentional discrimination or whether it also extends to disparate impact discrimination. Second, petitioner claims that the Tenth Circuit's affirmation of the district court's order reinstating the softball team conflicts with the First Circuit's holding that, in the very different context of a class action, the defendant university should have the opportunity first to present a remedial plan to the court. A review of each of these issues demonstrates conclusively that there is no conflict of authority.

A. Title IX's Prohibition Is Not Limited To Intentional Discrimination And, In Any Event, The Discrimination At Issue In This Case Was Intentional

1. *The Tenth Circuit's Decision Is In Full Accord With This Court's Decision In* Guardians *And All Other Controlling Authority*

The Tenth Circuit's conclusion that intent is not a necessary element of a Title IX athletics violation, Pet. App. C-18, is in full accord with all controlling authority. *See, e.g., Favia*, 812 F.Supp. at 584; *Cook*, 802 F. Supp. at 741; *Haffer v. Temple Univ.*, 678 F. Supp. 517, 539-40 (E.D. Pa. 1987); *cf. Pfeiffer v. Marion Ctr. Area Sch.*

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for determining whether there is a violation of Title IX. *Cook*, 802 F. Supp. at 743. The sport-specific analysis departs from both the agency interpretation, Policy Interpretation, 44 Fed. Reg. at 71422, as well as that of the courts. Regarding the burden of proof question, a better reasoned approach is clearly that expressed by the First Circuit, *Cohen*, 991 F.2d at 901 ("there is no need to search for analogies where, as in the Title IX milieu, the controlling statutes and regulations are clear"), and implicitly adopted by the Tenth Circuit. Nonetheless, neither question is before this Court and, in any event, the Magistrate Judge's holding instating the women's ice-hockey team is entirely consistent with the other decisions, including that of the Tenth Circuit.

Dist., 917 F.2d 779, 788 (3d Cir. 1990). Because Title IX was modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d,[15] *see Grove City College v. Bell*, 465 U.S. 555, 566 (1984); *Cannon v. University of Chicago*, 441 U.S. 677, 694-96 (1979), these courts have properly relied on this Court's analysis of the same question regarding the necessary showing of intent in the Title VI context. This Court's decision in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), the controlling Title VI case, is fully dispositive.

In *Guardians*, this Court, as it subsequently explained, held that while "Title VI itself directly reached only instances of intentional discrimination, . . . actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI." *Alexander v. Choate*, 469 U.S. 287, 293 (1985) (footnotes omitted). Like Title VI, Title IX explicitly delegates to the enforcing agency the authority to issue implementing rules and regulations. *Guardians*, 463 U.S. at 591 n.12 (Title VI); 20 U.S.C. § 1682 (1988) (Title IX). As a result, the agency's interpretation of Title IX, including "the complex determination of what sorts of disparate impacts upon [women] constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts," *Alexander*, 469 U.S. at 293-94, is entitled to the same deference extended under Title VI.[16]

[15] Because of the unique relationship between Title IX and Title VI, there is no support for petitioner's assertion that the application of *Guardians* to this case raises "broad" and "recurring" questions regarding agency authority to promulgate regulations. Pet. 17-18.

[16] Indeed, Title IX's subsequent history supports even greater deference to the Title IX regulations. In 1974, Congress specifically instructed the Department of Health, Education and Welfare (the enforcing agency at the time) to promulgate regulations implementing Title IX, including its prohibition against discrimination in

Accordingly, at the very least, a violation of Title IX's regulations—upon which this action is explicitly based—need not be predicated upon a showing of intent.[17] A simple reading of the athletics regulation, 34 C.F.R. § 106.41, demonstrates that it does not limit its reach to intentional discrimination. *See, e.g., Haffer*, 678 F. Supp. at 517.

The only court to have reached a contrary conclusion regarding Title IX's coverage of intentional discrimination, and which provides the sole support for petitioner's contention that there is a conflict of law on this subject, asked the proper question, i.e., whether Title VI reaches only intentional discrimination, but without the benefit of this Court's analysis in *Guardians*, reached the wrong conclusion. In *Cannon v. University of Chicago*, 648 F.2d 1104 (7th Cir.), *cert. denied*, 454 U.S. 1128 (1981), which was decided before *Guardians*, the Seventh Circuit concluded that Title VI prohibited only intentional dis-

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intercollegiate athletics. Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974). Under pre-existing law, Congress had the authority to disapprove such regulations. *See North Haven*, 456 U.S. at 531-32. Although it held extensive hearings on the regulations, and resolutions of disapproval were introduced, Congress did not disapprove the Title IX regulations, and they took effect on July 21, 1975. *Id.* at 533; *see also* Policy Interpretation, 44 Fed. Reg. at 71413. This postenactment history, which shows that Congress was aware of the Department's interpretation and the controversy regarding it, not only constitutes a second express delegation of regulatory authority but also "lends weight to the argument that [the regulatory] coverage" of athletics was intended. *North Haven*, 456 U.S. at 534 (upholding Title IX's employment regulations which had also been the subject of controversy).

[17] Indeed, Title IX itself may extend to disparate impact discrimination. *Cf. Alexander*, 469 U.S. at 294 n.11 (suggesting that the first part of the *Guardians* holding might not apply to cases brought under § 504 of the Rehabilitation Act, 29 U.S.C. § 794, which, like Title IX, was modeled on Title VI, because the Court's reasoning in *Guardians* was constrained by factors unique to Title VI).

crimination, drawing no distinction between Title VI and its regulations. *Id.* at 1108. It then relied on this conclusion for its holding that Title IX prohibited only intentional discrimination. *Id.* at 1109. Given this Court's different conclusion in *Guardians*, *Cannon* is no longer of any persuasive value on this issue and cannot create a conflict in the law that should be resolved by this Court.[18]

Moreover, this Court's decision in *Franklin v. Gwinnett County Pub. Sch.*, 112 S. Ct. 1028 (1992), constitutes an "implicit acknowledgment," *id.* at 1039 (Scalia, J., concurring), that Title IX's prohibition extends beyond intentional discrimination. *Franklin*'s conclusion "that a money damages remedy is available under Title IX for an intentional violation," *id.* at 1038 n.8, necessarily assumes that intent is not a necessary element of a Title IX violation. If Title IX only reached intentional violations, there would have been no need for the limitation of the damages remedy to cases of intentional discrimination. *Cf.* Pet. App. C-18 n.13.[19]

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[18] Petitioner's suggestion that the First Circuit has taken an approach between the Seventh and Tenth Circuits on this issue, Pet. 16, is based on a misreading of both the Tenth Circuit's decision in this case and the First Circuit's decision in *Cohen*. As recognized by petitioner, Pet. 16, the First Circuit concluded that, in order for there to be a Title IX violation, statistical evidence must be accompanied by "further evidence of discrimination, such as unmet need amongst the members of the disadvantaged gender." *Cohen*, 991 F.2d at 895. This formulation is virtually identical to, and in fact forms the express basis for, the Tenth Circuit's holding that a Title IX "plaintiff must not only show that the institution fails on the first benchmark of substantial proportionality but also that it does not fully and effectively accommodate the interests and abilities of its women athletes. *See Cohen*." Pet. App. C-14 (citation omitted). There is no disagreement at all between the First and Tenth Circuits on this point.

[19] In this regard, it is instructive that, as petitioner properly notes, Pet. 5 n.7, respondents' monetary damages claims which, of course, were dependent upon a showing of intentional discrimination, have been voluntarily settled.

There is no conflict of law on the question of whether intent is a necessary element of a Title IX claim.[20]

2. *The Tenth Circuit Properly Applied* Guardians *To This Case*

Petitioner also argues that *Guardians* should not be applied to this case because Title IX, including its athletics regulation, differs from Title VI and its regulatory framework in certain material respects. These arguments are without merit.

First, petitioner contends that the presence of 20 U.S.C. § 1681(b) distinguishes Title IX from Title VI and stands for the proposition that intent is a necessary element of a Title IX claim. Pet. 18. While, to be sure, there is no corollary provision in Title VI, this position is plainly wrong. Section 1681(b) was modeled on § 703(j) of Title VII, 42 U.S.C. § 2000e-2(j). *See* 1972 *U.S. Code Cong. & Admin. News* 2590-92 (1972) (Additional Views); *see also* 117 Cong. Rec. 39261-62 (1971) (remarks of Rep. Quie).[21] Section 703(j) has not stood in

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[20] The Tenth Circuit's use of Title VII analysis to further elucidate the requirements of Title IX is, contrary to the suggestion of petitioner, Pet. 16, consistent with this Court's precedent. *See Franklin*, 112 S. Ct. at 1037 (citing the seminal Title VII decision in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986), in support of the conclusion that Title IX likewise prohibits sexual harassment).

[21] Section 1681(b) provides:

> Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federal supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area:
>
> *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this

the way of over twenty years of jurisprudence applying Title VII to disparate impact cases. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988). The result must be the same for Title IX.[22]

Second, petitioner argues that *Guardians* only stands for the proposition that deference should be extended to an agency's regulations and that, therefore, the Tenth Circuit's reliance on the enforcing agency's Policy Interpretation was improper. Pet. 19. To begin with, the legislative delegation in 20 U.S.C. § 1682 is not limited to formal regulations, but is more broadly framed, authorizing the enforcing agency "to effectuate the provisions of section 1681 of this title . . . by issuing rules, regulations, or orders of general applicability."

Moreover, the Tenth Circuit, along with every other court which has addressed the issue, looked to the Policy

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chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

This section differs in principal part from § 703(j) by the inclusion of the proviso which specifically permits the use of statistical evidence in the proof of discrimination. Section 703(j) has no comparable provision.

[22] Moreover, Title VI's failure to include a corollary provision does not create an inference that *Guardians* should not be applied to Title IX. In *United Steelworkers v. Weber*, this Court explained that there is no analog to Title VII's 703(j) in Title VI because unlike Title VI, Title VII "was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments." 443 U.S. 193, 206 n.6 (1979). That is, because Title VI is limited by constitutional constraints, *University of Cal. Regents v. Bakke*, 438 U.S. 265 (1978), a provision such as § 703(j), or Title IX's § 1681(b), would be redundant. It is not necessary to reach here the question of whether Title IX is more like Title VI or Title VII in this regard, *see Franklin*, 112 S. Ct. at 1038 n.8 (declining to decide which constitutional power Congress relied on in enacting Title IX), because in either event, intent is not a necessary element of a violation of Title IX's regulations.

Interpretation, not as an independent source of authority, but as the enforcing agency's interpretation of its own regulations. Pet. App. C-8. Because the Policy Interpretation is an agency interpretation which, itself, was published following an extensive notice and comment procedure, and as one that has existed unchanged for fourteen years, surviving two subsequent amendments to Title IX,[23] as well as the Department of Education's recodification of the Department of Health, Education and Welfare's regulations pursuant to which it was initially promulgated, the Tenth Circuit properly recognized that it is due substantial deference. *Id.; accord Cohen*, 991 F.2d at 896-97 & n.10; *Williams v. School Dist. of Bethlehem, Pa.*, 998 F.2d 168, 171 (3d Cir. 1993). As this Court held in *North Haven Bd. of Educ. v. Bell*, in analyzing Title IX's employment regulations, "[i]n construing a statute, this Court normally accords great deference to the interpretation, particularly when it is longstanding, of the agency charged with the statute's administration." *North Haven*, 456 U.S. at 522 n.12 (citations omitted). The Tenth Circuit's reliance on the plain language of the regulation and the Policy Interpretation is fully in accord with this Court's decision in *Guardians*.[24]

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[23] *See* Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7 (abrogating states' Eleventh Amendment immunity under Title IX and other statutes); Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (reversing effect of this Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984)).

[24] Petitioner's argument that the agency did not intend its regulation to go beyond a prohibition of intentional discrimination is also unpersuasive. Pet. 19. Leaving aside the question of how the agency's decision regarding the structure of its regulations addressing affirmative and remedial action creates any inference on this subject at all, petitioner misstates the relevant history. The agency's decision not to adopt the proposed provision was made to achieve a uniform standard for affirmative and remedial efforts throughout the Title IX regulations rather than impose a special standard for athletics. As the comments accompanying the final rules explain, " 'affirmative efforts' [in athletics] *may still be required* pursuant to [the general affirmative action provision]

3. *The Discrimination At Issue In This Case Was Intentional*

Finally, even if Title IX and its athletics regulation were limited as suggested by petitioner, this case involves a straightforward example of intentional discrimination.[25] The question of whether or not Title IX extends beyond intentional discrmination is not presented.

The young women who brought this case as individual plaintiffs challenged the discriminatory treatment they suffered *as women* participating in a facially sex-segregated athletics program. It is well established that where gender discrimination results from such a facial, sex-based classification, intent is established as a matter of law. The question is not one of subjective motivation, as suggested by petitioner, Pet. 18,[26] but rather is determined by the very terms of the discrimination itself.[27] As this Court re-

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paragraph 86.3(a) [recodified as 34 C.F.R. § 106.41(a)]." *Department of Health, Education and Welfare, General Administration; Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefitting from Federal Financial Assistance*, 40 Fed. Reg. 24128, 24134 (June 4, 1975) (emphasis added).

[25] Respondents have alleged intentional discrimination in their complaint. *See supra* at 2 n.5.

[26] By confusing "motivation" with "intent," petitioner mistakes the relevant standard, even assuming a showing of intent is required. *Cf. Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (finding liability for intentional discrimination under the Age Discrimination in Employment Act based on a facial classification without further proof of intent, but requiring knowledge or a reckless disregard that the challenged conduct will violate the law for an award of liquidated or "punitive" damages).

[27] Contrary to the implicit assumption of petitioner, *see e.g.*, Pet. 10, 13, 16, the mere use of statistical proof does not transform a claim of intentional discrimination into a disparate impact case. *See, e.g., International Bro. of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-308 (1977); *Village of Arlington Hts. v. Metropolitan Hous. Dev.*, 429 U.S. 252, 265 (1977); *cf.* 20 U.S.C. § 1681(b) (specifically permitting the use of statistical evidence in establishing a Title IX violation).

cently explained in *International Union, UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991):

> [T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicitly facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination. In *Martin Marietta*, [400 U.S. 542 (1971)], the motives underlying the employer's express exclusion of women did not alter the intentionally discriminatory character of the policy.

Id. at 1203-1204. Yet, the "malevolent motive" standard is precisely that which is urged by petitioner. Pet. 9. This position is without merit.

B. The Reinstatement Of The Softball Team In This Case Does Not Conflict With The Holding Of The First Circuit

Petitioner also urges this Court to hear this case to resolve an alleged conflict between the Tenth Circuit's affirmance of the district court's reinstatement of the softball team and the First Circuit's conclusion in *Cohen* that, upon a finding of liability, the defendant institution should, in the first instance, be permitted to fashion a remedial plan for the court's consideration. *Cohen*, 991 F.2d at 906. At the outset, the district court's issuance of injunctive relief is reviewed under the abuse of discretion standard, *Wright v. Council of City of Empora*, 407 U.S. 451, 470 (1972); Pet. App. C-4, and the Tenth Circuit properly affirmed the reinstatement of the softball team under this standard. Moreover, petitioner's argument that the relief issued in this case is inconsistent with that ordered by the First Circuit in *Cohen* disregards a fundamental and controlling difference between the two cases: the case at bar is an individual action brought by

plaintiffs in their individual capacities seeking relief only for their individual injuries, while *Cohen* is a class action brought pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, raising class-wide claims of liability and, by definition, seeking a class-wide remedy. Because the remedy in *Cohen*, of necessity, implicates Brown's entire athletic program, it is entirely appropriate to permit the offending institution to propose a remedy, although, of course, the court is not bound by such proposal.[28]

This case, on the other hand, is an individual action brought by individual plaintiffs whose sole interest is to obtain redress for their particular injury. As such, the remedy issued below is an unremarkable application of the long-standing principle, recently reaffirmed by this Court with specific regard to Title IX, that " 'where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' " *Franklin*, 112 S. Ct. at 1033 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). This Court recognized in *Franklin* that because "prospective relief [would] accord[ ] no remedy at all" to Christine Franklin, monetary relief was necessary to redress her injury. *Id.* at 1038. So, too, as the Tenth Circuit explained, the relief ordered in this case "directly responds to the harms plaintiffs have sustained, and the relief they have requested, as individuals." Pet. App. C-20.

Moreover, the order below is fully consistent with this Court's admonition, also in a Title IX case, that "the award of individual relief to a private litigant is not only sensible but is also fully consistent with—and in some cases even necessary to—the orderly enforcement of the statute." *Cannon*, 441 U.S. at 705-706. Respondents

[28] Because *Cohen* only addressed the question of remedy in a class action, there is no support for petitioner's suggestion, Pet. 22, that the First Circuit would apply the same rule in an individual action.

brought this case to vindicate their right to play softball; there is no other relief which could make them whole.[29] They have every right to relief tailored to their particular injury.[30] Indeed, as the Tenth Circuit recognized, "[h]ad the district court allowed defendant to devise its own plan for Title IX compliance, it would, in effect have been forcing plaintiffs to become unwilling representatives in a class action suit they chose not to bring." Pet. App. C-20.

Finally, petitioner materially overstates the breadth and impact of the order below, Pet. 22-23, as it recycles many of the same arguments that were rejected by the Tenth Circuit. As the Tenth Circuit explained in responding to precisely these arguments:

> [b]ecause this is not a class action, the broad sweep of the remedy exists only in defendant's imagination. . . . Only the CSU softball players have established that their athletic interests are not being accommodated effectively under Title IX. Therefore, relief is appropriate only for them. Moreover, because this relief runs to plaintiffs individually, defendant is incorrect in its assumption that CSU must sustain a softball team indefinitely. To the contrary, once all the plaintiffs in this case have transferred or graduated, defendant could return to court and seek to have the injunction dissolved.
>
> Further, because the reinstatement of the softball team is predicated upon defendant's Title IX viola-

[29] As the Tenth Circuit held, "insofar as defendant's continuing violation of Title IX operates to deprive plaintiffs of the opportunity to play softball, we believe monetary relief alone is inadequate." Pet. App. C-19.

[30] Petitioner is incorrect in asserting that no authority suggests that Title IX compliance "*ever* requires an educational institution to sponsor a team in any particular sport." Pet. 9 (emphasis in original). The Policy Interpretation requires precisely this result in certain circumstances when a particular sport is offered to members of one sex but not to members of the underrepresented sex. Policy Interpretation, 44 Fed. Reg. at 71418.

> tion, if that violation were remedied in accordance with either of the other two benchmarks of the effective accommodation test defendant would then no longer be obligated to maintain its softball program. If, for example, defendant chose to cut its athletic programs in such a way as to meet the substantial proportionality benchmark, plaintiffs would have no basis for asserting their right to play softball.

Pet. App. C-20 - C-21 (citations omitted).

Two other circuit court decisions strongly support the Tenth Circuit's conclusion that the district court's remedy was a limited one, well within the proper exercise of its discretion. In *Cook v. Colgate Univ.*, the Second Circuit vacated the lower court's order instating a women's ice hockey team as moot upon the graduation of all of the plaintiffs. *Cook*, 992 F.2d at 17.[31] In addition, and in the context of a class action, the Third Circuit carefully considered the impact of the changed circumstances doctrine as it applied to the offending institution's request to modify the district court's injunction reinstating two particular teams upon a finding of discrimination. *Favia*, 1993 WL 405209, at *6-9. There is no support for petitioner's assertions regarding the nature of the remedy ordered in this case.

II. BECAUSE THE TENTH CIRCUIT NEITHER HELD THAT THE GENDER COMPOSITION OF CSU'S ATHLETIC PROGRAM MUST MIRROR THAT OF ITS STUDENT BODY, NOR ISSUED RELIEF TO SUCH EFFECT, THIS ISSUE DOES NOT PROVIDE A BASIS FOR GRANTING CERTIORARI

As discussed above in the statement of the case, the Tenth Circuit specifically rejected precisely the reading of the law that petitioner would ascribe to it in its first question presented; to wit, that the gender composition

[31] Like this case, *Cook* was a lawsuit brought by individuals, and not a class action.

of the athletic program is required to mirror that of the student body. *See* Pet. App. C-11 n.5 ("[a]n institution is not required to maintain gender balance . . ."); *id.* at n. 6 ("We reject defendant's argument that the district court's decision implicitly requires CSU to maintain parity between women's athletic participation and women's enrollment."); *id.* at C-14 ("[a] Title IX violation may not be predicated solely on a disparity between the gender composition of an institution's athletic program and the gender composition of its undergraduate enrollment, *see* § 1681(b)"); *accord Cohen v. Brown Univ.*, 991 F. 2d at 895 ("[A] court assessing Title IX compliance may not find a violation *solely* because there is a disparity between the gender composition of an educational institution's student constituency, on the one hand, and its athletic programs, on the other hand.") (emphasis in original).

Nor did the Tenth Circuit order statistically-based relief. It simply affirmed the district court's reinstatement of the softball team. Indeed, the Tenth Circuit did not even ask whether such reinstatement would create an athletic program that had the same proportion of female participants as the female share of enrollment, although the facts of record suggest that it would not.[32]

Because the Tenth Circuit did not employ a test which required that the female rate of enrollment match the female rate of participation, and because the remedy ordered did not contemplate or achieve such a result, this

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[32] The district court addressed this question in dicta, suggesting that if CSU had added, in addition to the softball team, a women's soccer and alpine skiing team it would reach substantial proportionality. Pet. App. A-19. However, as the Tenth Circuit made abundantly clear, while nothing prevents CSU's female soccer players or skiers from bringing an action (which they have not), "[t]hat is not the lawsuit before us." Pet. App. C-21 n.15.

issue does not provide a basis for granting certiorari in this case.[33]

III. THIS CASE DOES NOT IMPLICATE THE FUTURE OF INTERCOLLEGIATE ATHLETICS, HOWEVER, CONGRESS DESIGNED TITLE IX TO REDRESS HISTORIC AND PERVASIVE SEX DISCRIMINATION IN EDUCATION-RELATED ATHLETICS

Because petitioner's legal arguments do not withstand scrutiny, it is left to complain as a matter of policy that this case must be of great national significance because, if permitted to stand, it will surely wreak havoc on college and high school athletics programs nationwide. Petitioner as dramatically overstates the impact of this case as it misstates the reasoning of the Tenth Circuit. Neither the future of varsity athletics in general, nor that of football in particular, hangs in the balance. Moreover, this is a policy issue to be decided by Congress and not the federal courts. All that is at issue here is whether the respondent-softball players were discriminatorily denied the opportunity to compete in varsity athletics at CSU, and upon the finding that they were, whether they were entitled to the reinstatement of their softball team.

However, even if this Court takes into consideration the broader problems of sex discrimination in varsity athletics, petitioner draws precisely the wrong inference when it contends that the Tenth Circuit's decision must be wrong because Congress cannot have intended to place numerous educational institutions at risk of violating federal law. Pet. 25, 28 n.31. To the contrary, Congress specifically designed Title IX to be "a strong and com-

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[33] Similarly, petitioner's reliance on *Kelley v. Board of Trustees of the Univ. of Ill.*, No. 93-1327, 1993 U.S. Dist. LEXIS 12256 (C.D. Ill. Sept. 1, 1993), is misplaced. Pet. 27-28 n.31. While the district court's decision in that case was surely correct, the issue of Title IX's application to the termination of a men's team, where men are the overrepresented sex among athletic participants, is nowhere presented in this case.

prehensive measure [that would] provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women." 118 Cong. Rec. 5804 (1972) (remarks of Senator Bayh, principal Senate sponsor).

With this end clearly in mind, Congress has, over the past twenty years, taken a number of steps to reaffirm its views on the importance and nature of Title IX's prohibition against sex discrimination in athletics:

1. In 1974, Congress rejected the "Tower" amendment which would have "exempted revenue-producing athletics [including football] from the jurisdiction of Title IX." Policy Interpretation, 44 Fed. Reg. at 71413.[34]

2. In that same year, through the enactment of § 844 of Public Law 93-380, Congress directed the Department of Health, Education and Welfare to publish proposed Title IX regulations including "reasonable provisions" covering intercollegiate athletics, having previously reserved to itself the right to disapprove all such regulations. *See supra* at 13 n.16.

3. Pursuant to this provision, Congress held wide-ranging hearings on the proposed Title IX regulations which focused on the question of athletics. *Sex Discrimination Regulations, Hearings Before the Subcommittee on Postsecondary Education of the Committee on Education and Labor*, 94th Cong., 1st Sess. (1975). These hearings documented in extensive detail the pervasive discrimination against women in intercollegiate athletics.

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[34] Petitioner's suggestion that there should be a "football exemption" under Title IX, Pet. 24 n.28, inexplicably disregards the clear legislative history demonstrating that Congress specifically rejected precisely such special treatment. It also disregards the enforcing agency's conclusion that "football or other 'revenue producing' sports cannot be exempted from coverage of Title IX." Policy Interpretation, 44 Fed. Reg. at 71421.

4. Although resolutions were introduced in both the House and the Senate to disapprove the Title IX regulations, none passed and the regulations went into effect. *North Haven*, 456 U.S. at 533.

5. Congress again addressed the subject of sex-discrimination in education-related athletics during the debates regarding the Civil Rights Restoration Act of 1987, which was introduced in response to the rule announced by this Court in *Grove City College v. Bell*, 465 U.S. 555 (1984). By narrowly construing the "program or activity" language in Title IX, *Grove City College* had severely restricted Title IX's coverage of athletics. The debates regarding the Restoration Act returned on many occasions to the question of sex-discrimination in athletics, and they reflect a remarkable consensus within Congress that sex discrimination in athletics is a serious and widespread problem that should be prohibited by federal law. *See Cohen*, 991 F.2d at 894 ("[T]he record of the floor debate leaves little doubt that the enactment was aimed, in part, at creating a more level playing field for female athletes.").[35]

In short, although this case presents only a narrow and fact-specific example of sex discrimination in intercollegiate athletics, Congress has, for twenty years, been well aware of the broader problem. It has taken numerous opportunities to protect and strengthen the prohibition against such discrimination, both in Title IX itself and in the enforcing agency's interpretations of Title IX, which form the basis of the Tenth Circuit's decision.

Thus, in the final analysis, petitioner's position reduces to the oft-repeated but long-discredited defense of discrimination: we are only doing what everybody else is doing. Both the district court and the Tenth Circuit rejected this

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[35] Because Title IX's contemporary prohibition of discrimination in athletics is based in substantial part on the authority of the Restoration Act, these debates are of particular importance in construing its meaning.

argument out of hand.[36] It is not an argument worthy of this Court's attention.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[36] As The Tenth Circuit concluded, "[t]he fact that many or even most other educational institutions have a greater imbalance than CSU does not require a different holding." Pet. App. C-12; *see also* Pet. App. A-10 ("if defendants are found by this Court to be in violation of Title IX, the fact that CSU's participation statistics are better than those of other schools is of no legal consequence. . . . The issue of whether other universities are complying with Title IX is for other courts to decide based upon individualized allegations and independent findings of fact.").